

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT NONRULE POLICY DOCUMENT

Title: Self-Disclosure and Environmental Audit Policy

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Other Policies Repealed or Amended: Supplements Civil Penalty Policy

Brief Description of Subject Matter: Provides the Office of Enforcement at IDEM with the discretion to reduce or eliminate gravity-based civil penalties for violations voluntarily disclosed by entities to IDEM.

Citations Affected: IC 13-30-3; IC 13-30-4; IC 13-30-7; and IC 13-28-4-7

File Last Modified:

This nonrule policy document is intended solely as guidance and does not have the effect of law or represent formal Indiana Department of Environmental Management (IDEM) decisions or final actions. This nonrule policy document shall be used in conjunction with applicable laws.

It does not replace applicable laws, and if it conflicts with these laws, the laws shall control. A revision to this nonrule policy document may be put into effect by IDEM once the revised nonrule policy document is made available for public inspection and copying. IDEM will submit revisions to the Indiana Register for publication.

1.0 PURPOSE

This policy is designed to enhance protection of human health and the environment by encouraging regulated entities, including small businesses, to voluntarily discover, disclose, correct and prevent violations of federal and state environmental requirements.

2.0 APPLICABILITY

1. This policy applies to the assessment of penalties for any violations under all of the federal and state environmental statutes and any rule promulgated thereunder, that IDEM administers and supersedes any inconsistent provisions in media-specific penalty or enforcement policies.
2. To the extent that existing IDEM enforcement policies are not inconsistent, they will continue to apply in conjunction with this policy. However, a regulated entity that has received penalty mitigation for satisfying specific conditions under this policy may not receive additional penalty mitigation for satisfying the same or similar conditions under the policies for the same violation(s), nor will this policy apply to violations which have received penalty mitigation under other policies.

3. This policy sets forth factors for consideration that will guide the Agency in the exercise of its enforcement discretion. The policy is not final agency action, and is intended only as guidance. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties.
4. This policy should be used whenever applicable in settlement negotiations for administrative enforcement actions. It is not intended for use in pleading, at hearing or at trial. The policy may be applied at IDEM's discretion to the settlement of administrative enforcement actions instituted prior to, but not yet resolved, as of the effective date of this policy.

3.0 DEFINITIONS

For purposes of this policy, the following definitions apply:

“Due Diligence” encompasses the entity’s systematic efforts, appropriate to the size and nature of its business, to prevent, detect and correct violations through all of the following:

1. Compliance policies, standards and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits and other sources of authority for environmental requirements;
2. Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;
3. Mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;
4. Efforts to communicate effectively the entity’s standards and procedures to all employees and other agents whose duties involve environmental management;
5. Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures, including consistent enforcement through appropriate disciplinary mechanisms; and
6. Procedures for the prompt and appropriate disclosure and correction of any violations, and for any necessary modifications to the entity’s program to prevent future violations.

“Entity” means either a regulated entity or small regulated entity.

“Environmental audit” is defined as a voluntary, an internal, and a comprehensive evaluation of:

1. a facility or an activity at a facility regulated under Indiana Code Title 13; a rule or standard adopted under Indiana Code Title 13; any determination, permit, or order made or issued by the commissioner under Indiana Code Title 13; or federal law;
- or
2. management systems related to a facility or an activity;

that is designed to identify and prevent noncompliance with laws and improve compliance with laws, and that is conducted by an owner or operator of a facility or is an activity by an employee of the owner or operator or by an independent contractor.

“Environmental audit report” means a set of documents prepared as a result of an environmental audit and labeled “Environmental Audit Report” that includes those items defined at Indiana Code ' 13-11-2-69.

“Facility” means all contiguous land, and structures, other appurtenances, and improvements on the land.

“Gravity-based penalties” are that portion of a penalty over and above the economic benefit, i.e., the punitive portion of the penalty, rather than that portion representing a defendant’s economic gain from non-compliance.

“Regulated entity” means any person, facility, or entity, including a federal, state or municipal agency or facility, regulated under federal or state environmental laws and the rules or regulations promulgated thereunder.

“Small regulated entity” means either a person, corporation, partnership, or other entity who employs 100 or fewer individuals across all facilities and operations owned by the entity, or an incorporated or unincorporated community with a population of less than 2,500 that owns facilities supplying municipal services.

4.0 INCENTIVES FOR SELF-POLICING

1. Reduction of Gravity-Based Penalties by 75%

IDEM will reduce gravity-based penalties for violations of federal or state environmental requirements by 75% so long as the entity satisfies all of the conditions of Section V.2 through V.9 below.

2. Gravity-Based Penalties

Where the entity establishes that it satisfies all of the conditions of Section V of the policy, IDEM will not seek gravity-based penalties for violations of federal or state environmental requirements.

3. Criminal Recommendations

- a) IDEM will not recommend prosecution of an entity to an Indiana Prosecuting Attorney or other prosecuting authority where IDEM determines that either all the conditions, or conditions V.2 through V.9, in Section V are satisfied, so long as the violation does not demonstrate or involve:
 - i) a prevalent management philosophy or practice that concealed or condoned environmental violations; or
 - ii) high-level corporate officials' or managers' conscious involvement in, or willful blindness to, the violations.
- b) Whether or not IDEM refers the entity for criminal prosecution under this section, IDEM reserves the right to recommend prosecution for the criminal acts of individual corporate officials, managers, employees, or other individuals under existing policies guiding the exercise of enforcement discretion.

4. No Routine Request for Audits

IDEM will not request or use an environmental audit report disclosed under this policy to initiate a civil or criminal investigation of the entity. For example, IDEM will not request an environmental audit report in routine inspections. If IDEM has independent reason to believe that a violation has occurred, however, IDEM may seek information relevant to identifying violations or determining liability or extent of harm. An entity disclosing an environmental audit report to IDEM under this policy waives those privileges enumerated at Indiana Code ' 13-28-4-7

5.0 CONDITIONS FOR ENTITIES

1. Systematic Discovery

- a) The violation was discovered by a regulated entity through either:
 - i) an environmental audit; or
 - ii) an objective, documented, systematic procedure or practice

reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations. The regulated entity must provide accurate and complete documentation to IDEM as to how it exercises due diligence to prevent, detect and correct violations according to the criteria for due diligence outlined in Section III. IDEM may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available; or

- b) The violation was discovered by a small regulated entity through either:
 - i) an environmental audit; or
 - ii) receiving on-site or off-site compliance assistance from a government or government-supported program, including IDEM's Compliance and Technical Assistance Program or the Clean Manufacturing Technology and Safe Materials Institute at Purdue University, that offers services to small regulated entities, and the violations are detected during the compliance assistance.

2. Voluntary Discovery

The violation was identified voluntarily, and not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, variance, judicial or administrative order, agreed order, or consent agreement. For example, the policy does not apply to:

- a) emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required;
- b) violations of National Pollutant Discharge Elimination System (NPDES) discharge limits detected through required sampling or monitoring;
- c) violations discovered through an environmental audit required to be performed as a Supplement Environmental Project by the terms of a final agreed order or other settlement agreement.

3. Prompt Disclosure

The entity fully discloses a specific violation within 21 calendar days (or such shorter period provided by law) after it has discovered that the violation has occurred, or may have occurred, in writing to IDEM.

4. Discovery and Disclosure Independent of Government or Third Party Plaintiff

The violation must also be identified and disclosed by the entity prior to:

- a) the commencement of a federal, state or local agency inspection or investigation, or the issuance by such agency of an information request to the facility;
- b) notice of a citizen suit;
- c) the filing of a complaint in a court of law by a third party;
- d) the reporting of the violation to IDEM (or other government agency) by a “whistle blower” employee or a non-employee, rather than by one authorized to speak on behalf of the entity; or
- e) imminent discovery of the violation by a regulatory agency and, if the violation is discovered by a regulatory agency other than IDEM, as long as IDEM is notified in a timely manner by another regulatory agency.

5. Correction and Remediation

The regulated entity corrects the violation within 60 days after the date that the regulated entity notifies IDEM of the violation, certifies in writing that violations have been corrected, and takes appropriate measures as determined by IDEM to remedy any environmental or human harm due to the violation. Small regulated entities are expected to remedy a violation within the shortest practicable period of time, not to exceed 90 days following detection of the violation. However, a small regulated entity may take an additional period of 90 days (i.e., up to a period of six months from the date the violation is detected) only if necessary to allow a small regulated entity to correct the violation by implementing pollution prevention measures. If more than 60 days or 90 days, for regulated entities and small regulated entities, respectively, will be needed to correct the violation, the regulated entity or small regulated entity must so notify and receive approval from IDEM in writing before the respective notification timeframes have passed. Where appropriate, IDEM may require that to satisfy conditions 5 and 6, and the obligation to pay a civil penalty where appropriate, an entity enter into a publicly available written agreement, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediation harm is required. Correcting the violation includes remediating any environmental harm associated with the violation, as well as implementing steps to prevent a recurrence of the violation.

6. Prevent Recurrence

The entity agrees in writing to take steps to prevent a recurrence of the violation, which may include improvements to its environmental auditing or environmental

management system;

7. No Repeat Violations

The specific violation (or closely related violation) has not occurred previously within the past three years at the same facility under the same ownership, or is not part of a series or pattern of federal, state or local violations by the facility's parent organization (if any) at other facilities, which have occurred within the past three years. On a case-by-case basis, IDEM will consider disclosures made by corporations recently acquired by parent corporations with a series or pattern of federal, state, or local violations. For the purposes of this section, a violation is:

- a) any violation or alleged violation of federal, state or local environmental law identified in a judicial order or final administrative order, consent agreement or order, variance, field citation, complaint, warning letter, violation letter, notice of violation, conviction, or plea agreement; or
- b) any act or omission for which the entity has previously received penalty mitigation from IDEM, EPA, or a local agency.

8. Other Violations Excluded

The violation is not one which:

- a) resulted in serious actual harm, or may have presented an imminent and substantial endangerment to, human health or the environment; or
- b) violates the specific terms of any judicial or administrative order, variance, or consent agreement.

9. Cooperation

The entity cooperates as requested by IDEM and provides such information as is necessary and requested by IDEM to determine applicability of this policy. Cooperation includes, at a minimum, providing all requested documents and access to employees and assistance in investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations.

6.0 ECONOMIC BENEFIT

IDEM will retain its full discretion to recover any economic benefit gained at a result of noncompliance to preserve a "level playing field" in which violators do not gain a competitive advantage over entities that do comply. IDEM may forgive the entire penalty for violations which meet conditions 1 through 9 in Section V and, in IDEM's opinion, do not merit any penalty due to the insignificant amount of any economic benefit.

7.0 EFFECT ON FEDERAL LAWS, REGULATIONS OR POLICIES AND LOCAL ORDINANCES AND POLICIES

IDEM will work closely with the EPA and local agencies to encourage their support of this policy. IDEM remains firmly opposed to blanket immunities for violations that reflect criminal conduct, present serious threats or actual harm to health and the environment, allow noncomplying companies to gain an economic advantage over their competitors, or reflect a repeated failure to comply with federal or state law. IDEM will work with EPA to address any provisions of this policy that are inconsistent with EPA's Self-Disclosure and Environmental Audit Policy, and which may prevent a timely and appropriate response to significant environmental violations. IDEM reserves its right to take necessary actions to protect public health or the environment by enforcing against any violations of federal or state law.

8.0 ADMINISTRATION OF IDEM'S SELF-DISCLOSURE POLICY

For the purposes of this policy, environmental audit reports shall be marked appropriately and submitted to the following address:

Self-Disclosure and Environmental Audit Administrator
Indiana Department of Environmental Management
Office of Enforcement
100 North Senate Avenue
Indianapolis, Indiana 46206-6015

Questions can be directed to the Self-Disclosure and Environmental Audit Administrator at (317) 233-5529.

9.0 PUBLIC ACCOUNTABILITY

1. Within 3 years of the effective date of this policy, IDEM will review the effectiveness of the policy in encouraging:
 - a) changes in compliance behavior within the regulated community, including improved compliance rates;
 - b) prompt disclosure and correction of violations, including timely and accurate compliance with reporting requirements;
 - c) corporate compliance programs that are successful in preventing violations, improving environmental performance, and promoting public disclosure; and
 - d) consistency among state programs that provide incentives for voluntary compliance.

2. IDEM will make publicly available the terms and conditions of any compliance agreement reached under this policy, including the nature of the violation, the remedy, and the schedule for returning to compliance.